

**HARTA BITARA DEVELOPMENT SDN BHD v.
KHAIRUDDIN HJ MUSTAPA (PRESIDENT PERTUBUHAN SENI
SILAT LINCAH MALAYSIA)**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J

[COMMITTAL PROCEEDING NO: WA-37WP-39-09-2018
(CIVIL ACTION NO: 22NCVC-460-08-2015)]
23 NOVEMBER 2021

Abstract – *A writ of possession is not a form of judgment or order and thus does not come within the purview of O. 45 of Rules of Court 2012. A committal action cannot therefore be premised on a failure to comply with a writ of possession. Any move to cite the alleged contemnors for contempt, premised on non-compliance of a writ of possession, and not a judgment or an order, is deemed incompetent as a committal action should be initiated on the basis of non-compliance with an original judgment.*

CIVIL PROCEDURE: *Contempt of court – Order of committal – Application for – Rules of Court 2012, O. 52 r. 4 – Failure of contemnors to comply with writ of possession – Writ of possession served by Bailiff of court together with court notice ordering contemnors to deliver vacant possession to applicant – Whether there was personal service of writ of possession on alleged contemnors – Whether failure to adhere to writ of possession a basis to initiate contempt proceedings within contemplation of O. 45 of Rules of Court 2012 – Whether writ of possession qualified to be judgments and orders – Whether there was particularisation in O. 52 statement as to in what manner failure to obey writ of possession amounted to interference with due administration of justice – Whether contempt application flawed and basis of contempt charge unsound in law*

This concerned an application under O. 52 r. 4 of the Rules of Court 2012 ('RC') for an order of committal (encl. 13) in respect of the alleged failures of the alleged contemnors to comply with a writ of possession. The first alleged contemnor was the President of the defendant, a silat organisation, and the second alleged contemnor was its trustee. The plaintiff purchased, by way of a public auction, a property ('the property') from the defendant. The defendant was thus the previous owner of the property. The plaintiff, however, had to send a letter to the defendant to deliver vacant possession of the property, but to no avail. The plaintiff then moved to initiate a suit against the defendant, which had among others, prayed for the defendant to deliver vacant possession of the property. On 1 June 2018, the High Court gave judgment to the plaintiff and ordered the defendant to deliver vacant possession of the property to the plaintiff as the new registered proprietor

- A within seven days from the date of the judgment, and authorised the plaintiff to enter the property and even to use reasonable force to execute the said judgment against the defendant. However, given the continued refusal of the defendant, the plaintiff was granted leave to issue a writ of possession of the property. The writ of possession dated 13 September 2018 was served by the
- B Bailiff of the court on the defendant on 3 October 2018 together with a court notice also dated 3 October 2018 requiring the defendant to surrender vacant possession of the property on 10 October 2018. For this, the plaintiff had posted the said court notice and the writ of possession on the defendant's premises. The defendant's solicitors were also duly notified *via* a letter dated
- C 3 October 2018. As the deadline stated in the court notice arrived, with again nothing offered by the defendant at all, on that 10 October 2018, the plaintiff and the court Bailiff went to the property whereby the alleged contemnors with other representatives of the defendant informed that they could not surrender the property. A police report dated 11 October 2018 was then lodged by the plaintiff. The court Bailiff also prepared a report stating that
- D the second alleged contemnor had told him that vacant possession of the property would not be surrendered and that action would be taken if the territory of the property was disturbed. In return, the defendant association was notified that contempt proceedings would be instituted. As such, the plaintiff filed the instant application to commit the alleged contemnors. The
- E application was for the alleged contemnors to be committed to prison for contempt of this court by causing and/or willingly permitting or contributing to the failure and/or refusal of the defendant to comply with the court notice and the writ of possession to deliver vacant possession of the property. Leave was granted and the plaintiff thus moved the court by way of a motion to
- F commit the alleged contemnors pursuant to O. 52 r. 4 of the RC. The alleged contemnors, however, contended that there was no breach, and there was no personal service of the writ of possession on the alleged contemnors.

Held (dismissing application in encl. 13):

- G (1) Although it was argued that both the alleged contemnors did not have knowledge of the court notice and the writ of possession until that date of 10 October 2018, their very presence at the property on that deadline of 10 October 2018 set by the plaintiff in the court notice and the writ of possession strongly suggested the contrary. Now, in any event, even
- H if there was no personal service, this court may justifiably dispense personal service under O. 45 r. 7(7) of the RC because the alleged contemnors could be said to have had knowledge of the court notice and the writ of possession. The alleged contemnors did not contend that their presence at the property on that 10 October 2018 was for any other reason. The defendant had also admitted that the property was used for
- I its management office and training venue for its members. As such, it

was most unlikely that the alleged contemnors did not have knowledge of the court notice and the writ of possession that was posed by the court Bailiff at the property. These documents had also been served on 3 October 2018 on the solicitors of the defendant informing them that vacant possession of the property should be delivered by 10 October 2018. (paras 24-28)

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- (2) The first alleged contemnor had affirmed all of the defendant's affidavits in the suit which led to the writ of possession and the appeals therefrom. Both the alleged contemnors also acted as the defendant's witnesses during the earlier trial in the said suit. They were the key office-bearers of the association. They were able to procure the writ of possession and the court notice to be complied with. In stark contrast, on 10 October 2018, they had in no uncertain terms informed the court Bailiff that possession of the property would not be surrendered. Worse perhaps, the defendant had greatly benefited in that it had not paid rental for a period of almost four years. Given all that, it was tenuous and disingenuous for the alleged contemnors, with legal representation, to now claim not to have knowledge of the court notice and the writ of possession, at least constructive if not but more likely full and actual. This court considered it to be fair and just to dispense personal service. (paras 29 & 30)

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- (3) A writ of possession and a committal action are execution or enforcement proceedings to deal with non-adherences to any judgment or order of the court. A writ of possession is not itself an order of the court. As such, a failure to adhere to a writ of possession could not be a basis to initiate contempt proceedings within the contemplation of O. 45 of the RC. The very writ of possession or execution is meant and designed to enforce any issues of compliance with any judgment or order of the court. As such, a writ of possession (and for that matter the court notice) which cannot be characterised as a final determination or an interlocutory determination of any rights involving the parties to a litigation, did not qualify to be judgments and orders within the meaning of RC. A writ of possession and a court notice issued pursuant therefore could not attract the invocation of a contempt proceeding in the context of O. 45 r. 3 and 5 of the RC. (paras 33 & 36)

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- (4) Furthermore, the O. 52 statement in this case stated that the failure and refusal of the alleged contemnors to adhere to the writ of possession and to surrender vacant possession of the property was the act of contempt of court. It specifically referred to the alleged obstruction to the Bailiff to execute the writ of possession. The O. 52 statement did not say the contempt was based on the non-compliance with or breach of the original judgment of 1 June 2018, which had ordered delivery of vacant

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- A possession of the property to the plaintiff within seven days of the judgment, way back in June 2018. However, in accordance with the provisions of O. 45 r. 3, the writ of possession, like a committal action, is a form of execution process to enforce a judgment. A writ of possession is not a judgment or an order. As such, a committal action could not be initiated on the basis of the non-observance of the writ of possession. A committal action may be (and should have been) initiated on the basis of the non-compliance with the original judgment of 1 June 2018 as clearly stated in O. 45 r. 3 but this was not the action taken by the plaintiff now. (paras 37 & 38)
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- C (5) The law is well-settled in that the grounds on which an order of committal is sought must be set out with sufficient particularity in the O. 52 statement to enable the person alleged to be in contempt to have full knowledge of what charge he is facing so that he can meet the charge. However, other than a brief and fleeting mention of the alleged
- D contemnors obstructing the court's Bailiff and without more, there was a conspicuous absence of any particularisation in the O. 52 statement as to in what manner the failure to obey the writ of possession amounted to interference with the due administration of justice. In fact, there was no mention of interference with the administration of justice at all in the O. 52 statement. It must also be emphasised that under O. 52 r. 6(3) of the RC, in a contempt proceeding, only the grounds stated in the O. 52 statement shall be relied on and no further. Further, proof of contempt is on the standard of beyond reasonable doubt. However, here, the contempt was based on the obstruction to the writ of possession which was erroneous as the writ was not an order or judgment. And even if the basis was interference with due administration of justice, this was totally and wholly unsupported by the pleadings in the O. 52 statement. (paras 48-50)
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- G (6) The plaintiff's contempt application was flawed and the basis of the contempt charge was unsound in law. A contempt action is a quasi-criminal process requiring proof of contempt against an alleged contemnor beyond reasonable doubt. The plaintiff merely based its application on the alleged failure of the alleged contemnors to comply with the writ of possession which was found to be incompetent. A writ of possession is not a form of judgment or order and thus does not come within the purview of O. 45. Under O. 45 r. 3, a writ of possession and a committal action stand on equal footing as different modes of execution of a judgment or order. A committal action cannot therefore be premised on a failure to comply with a writ of possession. Any move to cite the alleged contemnors for contempt, which was premised on
- H non-compliance of a writ of possession, and not a judgment or an order,
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was incompetent in the context of O. 45 of the RC. Whilst an obstruction against a Bailiff of the court attempting to execute a writ of possession may in certain factual circumstances amount to an interference with the administration of justice – which is a form of criminal contempt – this was not the case presently, because the plaintiff never pleaded there was any interference with the administration of justice in the all-important O. 52 statement. (paras 51-53)

- (7) The relevant terms or paragraphs of the writ of possession in the instant case said to have been breached were in the nature of a positive order – because they clearly required the defendant to perform a specific act – that of surrendering the property. Importantly however, this act of surrendering and delivering vacant possession of the property was not stated in the writ of possession to be subject to a time stipulation, or specific deadlines for compliance. Although a deadline of 10 October 2018 was stated in the court notice, no similar time frame was stated in the writ of possession. Even though the O. 52 statement referred to the court notice, there was no mention of the court notice in O. 45 of the RC. Only the writ of possession and the committal action. As such, this alleged breach of the writ of possession could be said not to be one that had been established to justify an action for contempt of court under O. 42 r. 6, more so as there had been no application to the court under O. 45 r. 6 for a time to be specified in the writ of possession for the said act of surrendering the property to be performed (not that it would be proper since it was neither a judgment nor an order). Without such specification, a charge of contempt was defective. Again, the time for compliance was specified in the original judgment of 1 June 2018 to be seven days from that date. Yet this committal action, at the risk of repetition, was not relying on the breach of the original judgment. The plaintiff had thus failed to establish its case of contempt of court against the alleged contemnors. (paras 58-60)

Case(s) referred to:

- Alliance Building Society v. Austen* [1951] All ER 1068 (*refd*)
Bell v. Touhy And Another [2002] EWCA Civ 423 (*refd*)
Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd [2019] 4 CLJ 491 HC (*refd*)
Davy International Ltd And Others v. Tazzyman and Others [1997] 3 All ER 183 (*refd*)
Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors [2017] 10 CLJ 632 HC (*refd*)
Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd [2001] 4 CLJ 549 CA (*refd*)
Re Overseas Aviation Engineering (GB) Ltd [1963] Ch 24 (*refd*)
Robert Doran & Ors v. Kuan Pek Seng & Ors [2011] 1 LNS 670 HC (*refd*)
Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC (*refd*)

- A **Legislation referred to:**
Courts of Judicature Act 1964, s. 13
Federal Constitution, art. 126
Rules of Court 2012, O. 42 r. 6, O. 45 rr. 3(1), 5, 6, 7(7), O. 46 r. 1, O. 52 rr. 3, 4, 6(3)
- B *For the plaintiff - Danny Yap Sin Leng; M/s KS Lim & Ong*
For the defendant - Hasnal Rezua Merican & Muzzammil Merican; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
Reported by Suhainah Wahiduddin

C **JUDGMENT**

Mohd Nazlan Ghazali J:

Introduction

- D [1] This concerns an application under O. 52 r. 4 of the Rules of Court 2012 (“the RC 2012”) for an order of committal (encl. 13) in respect of the alleged failures of the alleged contemnors to comply with a writ of possession.
- E [2] After having heard submissions by parties at the hearing which was conducted by way of a remote communication technology *via* zoom, I dismissed the contempt application, and stated my key grounds for so deciding. This judgment contains the full reasons for my decision.

Key Background Facts

- F [3] The defendant is a silat organisation. The first alleged contemnor is Khairuddin bin Hj Mustafa who is the President of the defendant association and the second alleged contemnor is Datuk Megat Zulkarnain bin Hj Tan Sri Hj Omardin, who is its trustee.
- G [4] On 17 March 2014, the plaintiff purchased, by way of a public auction, a property known as HS(D) 49812, No. PT1896, Bandar Selayang Daerah Gombak, Negeri Selangor (“the property”) from the defendant. The defendant was thus the previous owner of the property.
- H [5] The plaintiff however had to send a letter dated 12 August 2015 to the defendant to deliver vacant possession of the property, but to no avail. The plaintiff then moved to initiate a suit against the defendant (No. 22NCVC-460-08-2015), which had among others, prayed for the defendant to deliver vacant possession of the property.
- I [6] The Kuala Lumpur High Court on 1 June 2018 gave judgment to the plaintiff and ordered the defendant to deliver vacant possession of the property to the plaintiff as the new registered proprietor within seven days from the date of the judgment, and authorised the plaintiff to enter the property and even to use reasonable force to execute the said judgment against the defendant. The orders stated as follows:

- (i) defendan menyerahkan milikan kosong kepada plaintif hartanah yang dikenali sebagai HS(D) 49812 No. PT1896 Bandar Selayang Daerah Gombak Negeri Selangor yang dihuni/diduduki oleh defendan dalam masa 7 hari dari tarikh penghakiman; A
- (ii) Berikutan perenggan (a) di atas, bahawa kebenaran diberi kepada Plaintif dan/atau Balif Mahkamah untuk memasuki hartanah HS(D) 49812 No. PT1896 Bandar Selayang Daerah Gombak Negeri Selangor dengan menggunakan kekerasan yang berpatutan sekiranya perlu untuk tujuan melaksanakan penghakiman terhadap Defendan; B
- [7] However, given the continued refusal of the defendant, on 4 September 2018, the plaintiff was granted leave to issue a writ of possession of the property (the WA-37WP-39-09-2018). The writ of possession dated 13 September 2018 was served by the Bailiff of the court on the defendant on 3 October 2018 together with a court notice also dated 3 October 2018 requiring the defendant to surrender vacant possession of the property on 10 October 2018. For this, the plaintiff through the Bailiff had posted the said court notice and the writ of possession on the defendant's premises. The defendant's solicitors were also duly-notified *via* a letter dated 3 October 2018. C
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- [8] It is important to show what the court notice states in this regard, as follows: E
- Sila ambil perhatian bahawa dengan perintah Mahkamah Tinggi Kuala Lumpur bertarikh 4 haribulan September 2018 dan menurut Writ Pemilikan bertarikh 13 haribulan September 2018, berhubungan dengan Guaman Sivil di atas. Bailiff yang bertandatangan di bawah dengan ini mengambil balik kesemua yang dikenali sebagai premis No. Lot 1896, Taman Sunway, Batu Caves, 68100 Batu Caves, Selangor. F
- Pada tarikh 10 haribulan Oktober 2018 atau sebelumnya, penghuni atau sesiapa yang tinggal di alamat tersebut dengan ini diperintahkan dengan secara aman memindahkan semua barang-barang mereka dan meninggalkan tempat tersebut. Kegagalan berbuat demikian Bailiff yang bertandatangan di bawah berhak jika perlu menggunakan kekerasan untuk mendapatkan semula harta tersebut, kecuali satu perintah Mahkamah diperolehi. G
- [9] No less important, the writ of possession states as follows: H
- Bahawasanya baharu-baharu ini, mengikut penghakiman Mahkamah bertarikh 1.6.2018, telah dihakimkan bahawa Defendan, Khairuddin bin Hj Mustapa (No. K/P: 570130-05-5451) (sebagai Presiden Pertubuhan Seni Silat Lincah Malaysia) hendaklah memberikan Plaintif, Harta Bitara Development Sdn Bhd, pemilikan kosong dengan alamat Lot No. PT1896, Taman Sunway Batu Caves, 68100 Batu Caves, Selangor yang dipegang I

A di bawah HS(D) 49812, No. PT1896, Bandar Selayang, Daerah Gombak Negeri Selangor dan hendaklah membayar kepada Plaintiff ganti rugi untuk ditaksirkan dan kos sebanyak RM20,000 tertakluk kepada 4% alokatur.

B Kami perintahkan bahawa kamu memasuki Harta Tak Alih Tersebut dan menyebabkan Plaintiff, Harta Bitara Development Sdn Bhd tersebut, mendapat pemilikan ke atas ...

[10] As the deadline stated in the court notice arrived, with again nothing offered by the defendant at all, on that 10 October 2018, the plaintiff and the court Bailiff went to the property whereby the alleged contemnors with other
C representatives of the defendant informed that they could not surrender the property because of, first, there are more than 100,000 members of the defendant and there was no assurance what action would be taken by them if the plaintiff took possession of the property; secondly, the plaintiff taking possession of the property would be turned into a racial issue; and thirdly,
D they wished to further discuss with the plaintiff on the vacant possession of the property.

[11] A police report dated 11 October 2018 was then lodged by the plaintiff's representative. The court Bailiff also prepared a report stating that the second alleged contemnor had told him that the vacant possession of the
E property would not be surrendered and that action would be taken if the territory of the property was disturbed. In return, the defendant's solicitors were notified that contempt proceedings would be instituted.

[12] As such on 11 December 2018, the plaintiff filed the instant application to commit the alleged contemnors. The application is for the
F alleged contemnors to be committed to prison for contempt of this court by causing and/or willingly permitting or contributing to the failure and/or refusal of the defendant to comply with the court notice dated 3 October 2018 and the writ of possession dated 13 September 2018 to deliver vacant possession of the property.

G [13] The application states as follows:

H Bahawa Khairuddin bin Hj Mustapa & Megat Zulkarnain bin Tan Sri Haji Oardin dikomitkan ke penjara kerana penghinaan terhadap Mahkamah yang Mulia ini, yang mana beliau telah menyebabkan dan/atau dengan relanya membenarkan dan/atau telah menyumbangkan kepada kegagalan dan/atau keengganan Defendan untuk mematuhi terma Notis bertarikh 3.10.2018 dan Writ Pemilikan bertarikh 13.9.2018.

[14] Leave was granted and the plaintiff thus moved the court by way of a motion to commit the alleged contemnors pursuant to O. 52 r. 4 of the Rules of Court 2012 ("the RC 2012"). As at the date of the hearing, the
I defendant continues to be in occupation of the property.

Compliance with O. 52 r. 3

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[15] The procedural law on contempt proceedings is well-settled as affirmed by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849. It is anchored on O. 52 r. 3 of the RC 2012 in respect of the requirement for leave to commence committal proceedings which reads as follows:

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Application to Court (O. 52 r. 3)

3 (1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

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(2) An application for such leave must be made *ex parte* to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

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[16] The critical importance of the O. 52 statement cannot be emphasised enough. Given its specific mention in O. 52 r. 3 which governs the application for leave, it is absolutely imperative that the court assess the sufficiency of the O. 52 statement at the leave stage prior to it being granted to commence the substantive committal proceedings.

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[17] There is however no issue with the compliance by the plaintiff with O. 52 r. 3 and there is no real challenge by the alleged contemnors on the same, save for a matter to be discussed below. After all, the plaintiff has set out in the O. 52 statement the details of the alleged non-compliance with the court notice and the writ of possession, which in turn are the very grounds upon which the committal leave order was previously granted. The O. 52 statement is also supported by the affidavits in support.

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Key Principles On Contempt

[18] In any contempt proceedings the strict application of a number of key governing principles is imperative. The High Court in *Dewan Perniagaan Melayu, Malaysia Negeri Johor v. Menteri Besar Johor & Ors* [2017] 10 CLJ 632 stated the following:

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Important Set of Principles on Contempt Charge

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[36] The law governing the grant of committal orders is fairly settled. A discussion on the same is unnecessary for the purposes of this instant application. However, as distilled from the various authorities, as a guide, I wish to reiterate, in summary fashion, four key principles that courts must take into account when examining the terms of the court orders contended to have been infringed or not complied with by an alleged contemnor. These are:

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- A (a) Contempt proceedings are criminal in nature because they involve the liberty of the alleged contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849);
- B (b) A charge of contempt must therefore be proved beyond reasonable doubt (see the English Court of Appeal decision in *Re Bramblevale Ltd* [1970] 1 Ch 125);
- C (c) It is a fundamental principle of fairness that no order of court will be enforced by committal unless it is expressed in clear and unambiguous language (see the Court of Appeal decision in *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412); and
- (d) Any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor And Other Appeals* [1995] 4 CLJ 427).

D **Contentions Of Parties**

[19] As contempt proceedings are criminal in nature, it is essential that the provisions of the terms of the order or judgment of the court asserted to have been infringed, which in this case, according to the O. 52 statement is based on the court notice and the writ of possession, are worded in clear language, free from any ambiguity that could otherwise defeat any such proceedings.

[20] The alleged contemnors however contended that there is no breach, and there was no personal service of the writ of possession on the alleged contemnors.

F [21] The plaintiff argued that the act of contempt is plain and obvious, and proven beyond reasonable doubt. This is because the alleged contemnors had caused the defendant not to comply with the writ of possession and court notice by failing to vacate the property and handing over vacant possession of the same to the plaintiff on 10 October 2018. It is not disputed that vacant possession was not surrendered to the court Bailiff on 10 October 2018 despite being demanded to do so. Instead the defendant even continues to occupy the property presently.

G [22] The plaintiff also submitted and this is especially important, that the conduct of the alleged contemnors is a clear interference with the course of justice and an obstruction against the court Bailiff from discharging his duties of claiming vacant possession of the property on 10 October 2018. Reference was made by the plaintiff to the following passages in *The Law of Contempt* by Nigel Lowe and Brenda Sufrin, (Butterworths 1996) under the heading of acts which interfere with the course of justice:

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The general principle by which interference with persons having duties to discharge in a court of justice amounts to contempt was explained by Bowen LJ in *Re Johnson*:

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... The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice'.

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The phrase 'persons having duties to discharge in a court of justice' is interpreted widely – it includes ... court officers such as process servers, sheriffs, bailiffs ...". (pages 401-402).

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Interference with officers of the court

Acts which prevent or which are intended to prevent officers of the court from carrying out their duties constitute contempt of court ...

By 'officers of the court' it is meant those persons having official duties to perform in connection with court proceedings...it has been held to be contempt to obstruct or interfere with solicitors, sheriffs and their deputies (for example bailiffs), receivers, liquidators (page 433).

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[23] The plaintiff also relied on the English case of *Alliance Building Society v. Austen* [1951] All ER 1068 which it submitted held that the court has the power to commit for contempt any person who frustrates or attempts to frustrate a writ of possession. In addition, the notion of interference with the due administration of justice has also been endorsed by our courts, as exemplified by the decision of the Court of Appeal in *Jasa Keramat Sdn Bhd v. Monatech (M) Sdn Bhd* [2001] 4 CLJ 549; [2001] 4 MLJ 577, particularly in the following passages:

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From the judgments referred to above, it is clear that the existence of an injunction order is not a pre-requisite for contempt of court. The test is not the breach of the order but interference with the due administration of justice or as some learned judges put it, interference with the course of justice. The two phrases, in our view, mean the same thing. And, the categories of contempt are never closed. Low Hop Bing J, in *Chandra Sri Ram v. Murray Hiebert* has aptly stated the law at p. 270 and we agree with him:

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The circumstances and categories of facts which may give rise and which may constitute contempt of court, in a particular case, are never closed.

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We agree with these statements of law and we see no reason why we should not apply the common law principles that have been consistently applied by our courts.

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A Analysis And Findings Of This Court

The Issue Of Personal Service Of The Writ Of Possession

B [24] I should first deal with the issue of personal service of the writ of possession, *albeit* in summary fashion. Although it is argued that both the alleged contemnors did not have knowledge of the court notice and the writ of possession until that date of 10 October 2018, their very presence at the property on that deadline of 10 October 2018 set by the plaintiff in the court notice and the writ of possession strongly suggests the contrary. More so, as stated earlier, the court's notice and writ of possession had also been served on the defendant's solicitors on 3 October 2018.

C [25] Now, in any event, even, for argument sake, there was no personal service, this court may justifiably dispense personal service under O. 45 r. 7(7) of the RC 2012 because the alleged contemnors could be said to have had knowledge of the court notice and the writ of possession. It reads:

D [7] Without prejudice to its power under O. 62 rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

E [26] There have been cases where this dispensation was granted such as in *Robert Doran & Ors v. Kuan Pek Seng & Ors* [2011] 1 LNS 670, where the High Court invoked O. 45 r. 7(7) and granted retrospective dispensation of service of court orders because it was just for the court to exercise such discretion, for the reason that the contemnors have all filed affidavits making direct reference to the said orders (see also the English Court of Appeal case of *Davy International Ltd And Others v. Tazzyman and Others* [1997] 3 All ER 183).

F [27] In my judgment O. 45 r. 7(7) should similarly apply in the instant case. The alleged contemnors did not contend that their presence at the property on that 10 October 2018 was for any other reasons. The defendant had also admitted that the property is used for its management office and training venue for its members.

G [28] As such, it is most unlikely that the alleged contemnors did not have knowledge of the court notice and the writ of possession that was posted by the court Bailiff at the property as stated in the affidavit of service by the court bailiff, quite apart from the fact that these documents had also been served on the solicitors of the defendant on 3 October 2018 where it was informed that vacant possession of the property should be delivered by 10 October 2018. It is also observed that this is pretty clear from the defendant's own stance in not making any offer to the plaintiff in respect of the former's alleged wish to buy the property from the plaintiff. Instead, the defendant continues to occupy the property without paying rentals to the plaintiff.

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[29] In fact, the first alleged contemnor had affirmed all of the defendant's affidavits in the suit which led to the writ of possession and the appeals therefrom. Both the alleged contemnors also acted as the defendant's witnesses during the earlier trial in the said suit. They are the key office-bearers of the association. They are able to procure that the writ of possession and court notice to be complied with. In stark contrast, on 10 October 2018, they had in no uncertain terms informed the court Bailiff that possession of the property would not be surrendered. Worse perhaps, the defendant has greatly benefited in that it had not paid rental for a period of almost four years.

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[30] Given all that, it is tenuous and disingenuous for the alleged contemnors, with legal representation, to now claim not to have knowledge of the court notice and the writ of possession, at least constructive if not but more likely full and actual. This court considered it to be fair and just to dispense personal service.

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The Important Question On The Basis Of This Contempt Action

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[31] This application, it must be emphasised, as also made crystal clear by the plaintiff, is for a committal order against the alleged contemnors for obstructing the Bailiff of the court on 10 October 2018 from executing the writ of possession dated 13 September 2018 and for their refusal to surrender vacant possession of the property to the Bailiff pursuant to writ of possession and the court notice dated 3 October 2018. The plaintiff stated in the O. 52 statement that the alleged contemnors had committed contempt by obstructing the court Bailiff from discharging his duty by claiming the vacant possession of the property, as per para. 21 and more, as follows:

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21. Oleh yang demikian, KM dan MZ telah bertindak untuk menghalang Bailif Mahkamah Tinggi Kuala Lumpur dari melaksanakan tugasnya untuk mengambil milikan kosong Hartanah tersebut dari Defendan. Melalui surat bertarikh 19.10.2018, peguam cara Plaintiff telah memaklumkan peguam cara Defendan bahawa prosiding penghinaan Mahkamah akan difailkan berkenaan keengganan Defendan untuk menyerahkan milikan kosong Hartanah tersebut.

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22. Oleh kerana keengganan Defendan untuk menyerahkan milikan kosong Hartanah tersebut kepada Bailif Mahkamah Tinggi Kuala Lumpur, beliau dan peguam cara Plaintiff bersama dengan wakil Plaintiff terpaksa meninggalkan Hartanah tersebut pada 10.10.2018 tanpa Bailif berjaya untuk melaksanakan Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018.

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23. Tindakan Defendan yang dinyatakan di atas adalah secara langsung bertentangan Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 dimana menurut yang sama, Defendan adalah dikehendaki untuk menyerahkan milikan kosong Hartanah tersebut secara aman.

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A 24. Sehingga masa kini, Defendan masih gagal, enggan dan/atau abai untuk mematuhi Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 tersebut dengan gagal untuk menyerahkan milikan kosong Hartanah tersebut secara aman.

B 27. Kegagalan dan/atau keengganan KM dan MZ seperti yang dinyatakan di atas merupakan satu keingkaran terhadap Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 yang sengaja dilakukan dan adalah satu tindakan menghina Mahkamah yang Mulia ini.

C [32] At an earlier session of this hearing, I had asked parties to submit on whether an order of committal could be founded on an alleged failure to obey a writ of possession. I asked because this appears to be the foundation of the plaintiff's application for a committal order. I had raised this as O. 45 r. 3(1) of the RC 2012 clearly provides as follows:

D Subject to these Rules, a judgment or order for the giving of possession of immovable property may be enforced by one of more of the following means:

(a) a writ of possession;

(b) in a case in which rule 5 applies, an order of committal.

E *A Contempt Cannot Be Invoked To Visit Non-compliance With A Writ Of Possession Under O. 45*

F [33] I think it needs no explanation that a writ of possession and a committal action are execution or enforcement proceedings to deal with non-adherences to any judgment or order of the court. A writ of possession is not by itself an order of the court. As such, a failure to adhere to a writ of possession cannot be a basis to initiate contempt proceedings within the contemplation of O. 45 of the RC 2012. The very writ of possession or execution is meant and designed to enforce any issues of compliance with any judgment or order of the court. It is manifest that there are two prescribed methods of enforcement under O. 45 r. 3, namely by way of writ of possession and where r. 5 applies, an order of committal. The entire scheme of O. 45, in particular rr. 3 and 5 concern the execution of a judgment or an order of the court.

G [34] Order 46 r. 1 defines a writ of possession as a form of a "writ of execution" whereby it is stated:

H In this Order, unless the context otherwise requires, "writ of execution" includes a writ of seizure and sale, a writ of possession and a writ of delivery.

I [35] The English Court of Appeal in *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24, a case referred to by the counsel for the alleged contemnors, described "execution" as follows:

The word “execution” is not defined in the Act. It is, of course, a word familiar to lawyers. “Execution” means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is “completed” when the judgment creditor gets the money or other thing awarded to him by the judgment ... And the same meaning is to be found in *Blackman v. Fysh*, when Kekewich J said that execution means the “process of law for the enforcement of a judgment creditor’s right and in order to give effect to that right”. In cases when execution was had by means of a common law writ, such as *feri facias* or *elegit*, it was legal execution: when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. But in either case, it was “execution” because it was the process for enforcing or giving effect to the judgment of the court.

[36] As such, a writ of possession (and for that matter the court notice), which cannot be characterised as a final determination or an interlocutory determination of any rights involving the parties to a litigation, do not qualify to be judgments and orders within the meaning of the RC 2012. A writ of possession and a court notice issued pursuant therefore cannot attract the invocation of a contempt proceedings in the context of O. 45 r. 3 and r. 5 of the RC 2012.

[37] Furthermore, the O. 52 statement in this case states that the failure and refusal of the alleged contemnors to adhere to the writ of possession and to surrender vacant possession of the property is the act of contempt of court. It specifically refers to the alleged obstruction to the Bailiff to execute the writ of possession. The O. 52 statement does not say the contempt is based on the non-compliance with or breach of the original judgment of 1 June 2018, which had ordered delivery of vacant possession of the property to the plaintiff within seven days of the judgment, way back in June 2018. However, in accordance with the provisions of O. 45 r. 3, the writ of possession, like a committal action is a form of execution process to enforce a judgment. A writ of possession, as emphasised earlier, is not a judgment or an order.

[38] As such, a committal action cannot be initiated on the basis of the non-observance of the writ of possession. A committal action I reiterate may be (and should have been) initiated on the basis of the non-compliance with the original judgment of 1 June 2018 as clearly stated in O. 45 r. 3 but this is not the action taken by the plaintiff now.

[39] I do not disagree with learned counsel for the plaintiff that O. 45 r. 3 merely provides the manner in which an order giving possession of immovable property can be enforced – by way of a writ of possession or an order for committal.

[40] But then learned counsel argued what would happen when a defendant obstructs the Bailiff of the court in the execution of the writ of possession or when the defendant refuses to surrender vacant possession of an immovable

- A property to the bailiff. It was submitted that such an action must constitute a contempt of court. Learned counsel then repeated the common law position to support the plaintiff's position by making references to the text *The Law of Contempt* as well as the English authority of *Alliance Building Society v. Austen* [1951] All ER 1068 as mentioned earlier. Also, in the English Court of Appeal decision in *Bell v. Touhy And Another* [2002] EWCA Civ 423 it was held that despite a warrant of possession had been directed at the Bailiff to take vacant possession of a property (as opposed to being directed to the defendant), the obstruction against the Bailiff in the execution of a warrant of possession was ruled to tantamount to a contempt of court.
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- C [41] If such actions by the alleged contemnors do not constitute an act of contempt, the plaintiff argued that the same would tantamount to a travesty of justice as the defendant and the alleged contemnors would be able to freely ignore writs of possession with impunity, and this cannot be accepted as representing the correct position under the law. The plaintiff even reminded
- D this court that the power to punish for contempt is provided under art. 126 of the Federal Constitution and s. 13 Courts of Judicature Act 1964.
- [42] In addition, learned counsel for the plaintiff also argued that such conduct on the part of the alleged contemnors would invariably constitute an interference with the administration of justice which is also an act of
- E contempt of court (see the decision of the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors (supra)*).
- Contempt In The Sense Of Interference With The Administration Of Justice Cannot Sustain Because Not Pleaded In Order 52 Statement*
- F [43] This then is the crux of the problem or flaw in the contempt action instituted by the plaintiff. The failure to make clear what is the actual basis for the application for a committal order against the alleged contemnors.
- [44] For completeness, paras. 21 to 27 of the O. 52 statement, which for all intents and purposes the law construes as the charge sheet of the contempt
- G against the alleged contemnors, stated the following:
- (a) "bertindak untuk menghalang Bailiff Mahkamah Tinggi Kuala Lumpur dari melaksanakan tugasnya untuk mengambil milikan kosong Hartanah tersebut daripada Defendan";
- H (b) "Oleh kerana keengganan Defendan untuk menyerahkan milikan kosong Hartanah tersebut kepada Bailif Mahkamah Tinggi, beliau dan peguamcara Plaintiff bersama dengan wakil Plaintiff terpaksa meninggalkan hartanah tersebut pada 10.10.2018";
- (c) "Tindakan Defendan yang dinyatakan di atas adalah secara langsung bertentangan Notis bertarikh 3.10.2018 dan Writ Pemilikan bertarikh 13.9.2018 tersebut dengan gagal untuk menyerahkan milikan kosong Hartanah tersebut secara aman";
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- (d) “Sehingga kini, Defendan masih gagal enggan dan/atau abai untuk mematuhi Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 tersebut dengan gagal untuk menyerahkan milikan kosong Hartanah tersebut dengan aman”;
- (e) “KM dan MZ (the alleged contemnors) mempunyai tanggungjawab untuk memastikan bahawa Defendan mematuhi Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018”;
- (f) “Selain itu, KM dan MZ (the alleged contemnors) merupakan pihak yang mampu dan boleh menyebabkan Defendan untuk mematuhi Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 dan mereka telah gagal berbuat demikian”;
- (g) “Kegagalan dan/atau keengganan KM dan MZ merupakan satu keingkaran terhadap Notis bertarikh 3.10.2018 dan Writ Milikan bertarikh 13.9.2018 yang sengaja dilakukan adalah satu tindakan menghina Mahkamah yang Mulia ini”.
- [45] The committal action here, as is readily plain from the above, is very clear in relation to the non-adherence to the writ of possession. This as I have determined, cannot be sustained under O. 45 of the RC 2012.
- [46] However, this does not mean that the failure to obey the writ of possession cannot amount to contempt of court. I absolutely agree that on the face of it, the conduct of the alleged contemnors is wrong and unacceptable under the law. But not within the context of O. 45 of the RC 2012.
- [47] It may readily constitute contempt of court under the law if the failure to obey or the obstruction, if any, of the writ of possession can be demonstrably shown to amount to an interference in the due administration of justice. I accept that the plaintiff’s counsel did make this submission, as referred to above, as well-supported by common law authorities.
- [48] But the flaw in the approach taken by the plaintiff is this. The law is well-settled in that the grounds on which an order of committal is sought must be set out with sufficient particularity in the O. 52 statement to enable the person alleged to be in contempt to have full knowledge of what charge he is facing so that he can meet the charge (see *Tan Sri Dato’ (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*) as referred to earlier). However, other than a brief and fleeting mention of the alleged contemnors obstructing the court’s Bailiff and without more, there is a conspicuous absence of any particularisation in the O. 52 statement as to in what manner the failure to obey the writ of possession amounts to interference with the due administration of justice. In fact, there is no mention of interference with the administration of justice at all in the O. 52 statement.

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- A [49] The alleged contempt of court, as stated in the O. 52 statement as that the alleged contemnors, “telah menyebabkan dan/atau dengan relanya membenarkan dan/atau telah menyumbang kepada kegagalan dan/atau keengganan defendan untuk mematuhi terma notis bertarikh 3 Oktober 2018 dan writ pemilikan bertarikh 13 September 2018”. It is apparent that the
- B motion was premised on a failure to comply or abide with the writ of possession and the court notice but not an alleged interference with the administration of justice.
- [50] I must also emphasise that under O. 52 r. 6(3), in a contempt proceeding, only the grounds stated in the O. 52 statement shall be relied on
- C and no other. Further, proof of contempt, I need hardly add, is on the standard of beyond reasonable doubt. However, here, the contempt is based on the obstruction to the writ of possession which is erroneous as the writ is not an order or judgment. And even if the basis is interference with due administration of justice, this is totally and wholly unsupported by the
- D pleadings in the O. 52 statement. As I mentioned earlier, in contempt proceedings, a charge on contempt in respect of the alleged breach must be clear and specific so that the alleged contemnor is afforded the full opportunity to answer the same, and that any ambiguity must be resolved in favour of the alleged contemnor.
- E [51] The plaintiff takes pain to make the point that it would be grossly unfair if the failure of the alleged contemnors to surrender the property in compliance with the writ of possession goes unpunished. I think the plaintiff totally misses the point. The whole issue is the plaintiff’s contempt application is flawed. The basis of the contempt charge is unsound in law.
- F [52] A contempt action is a *quasi*-criminal process requiring proof of contempt against an alleged contemnor beyond reasonable doubt. The plaintiff never pleaded the alleged contemnors had interfered with the administration of justice as the ground for the court to commit them for contempt. The plaintiff merely based its application on the alleged failure of
- G the alleged contemnors to comply with the writ of possession which I have found to be incompetent in this case.
- [53] As such it bears reiteration that a writ of possession is not a form of judgment or order and thus does not come within the purview of O. 45. Under O. 45 r. 3, a writ of possession and a committal action stand on equal
- H footing as different modes of execution of a judgment or order. A committal action cannot therefore be premised on a failure to comply with a writ of possession. I cannot but therefore agree that any move to cite the alleged contemnors for contempt, which is premised on non-compliance of a writ of possession, and not a judgment or an order, is incompetent in the context of
- I O. 45 of the RC 2012. For the avoidance of doubt, I must mention that whilst an obstruction against a Bailiff of the court attempting to execute a writ of

possession may in certain factual circumstances amount to an interference with the administration of justice – which is a form of criminal contempt – this is not the case presently, because the plaintiff never pleaded there was any interference with the administration of justice in the all-important O. 52 statement.

[54] There is one other point. As a matter of fact, and law, the first and proper recourse to ensure a satisfaction of the execution of the writ of possession is clearly stated in the writ of possession itself, which as stated above, provides that “Kegagalan berbuat demikian, Bailif yang bertandatangan di bawah berhak jika perlu menggunakan kekerasan untuk mendapatkan semula harta tersebut, kecuali satu perintah mahkamah diperoleh”. The plaintiff, through the Bailiff is as such fully authorised to use force, reasonable in the circumstances, to see through that the writ is executed to its rightful conclusion. Instead, the plaintiff unnecessarily confused and conflated the matter by filing a contempt proceeding in a fashion that is fraught with various infirmities, and potentially being in abuse of the court process.

Time For Compliance Not Specified In The Writ Of Possession

[55] The other one major problem with the reliance on non-adherence to the writ of possession is that the writ itself (quite apart from the issue that it is not an order or judgment in the first place) does not specify the time for compliance.

[56] The requirement for time stipulation is a pre-requisite for a positive order but not if it is a passive order, which is an order requiring a person to abstain from doing an act. Under O. 42 r. 6 of the RC 2012 a judgment or order which requires a person to do an act, which may be said to be a positive order, shall specify the time, after service of the judgment or order, within which the act is to be done.

[57] A contempt charge based on a positive order without time stipulation is therefore defective (see *Dato’ Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* [2019] 4 CLJ 491).

[58] The relevant terms or paragraphs of the writ of possession in the instant case said to have been breached are in the nature of a positive order – because they clearly require the defendant to perform specific act – that of surrendering the property. Importantly however, this act of surrendering and delivering vacant possession of the property is not stated in the writ of possession to be subject to a time stipulation, or specific deadlines for compliance. Although a deadline of 10 October 2018 is stated in the court notice, no similar time frame is stated in the writ of possession. Now I must stress that even though the O. 52 statement refers to the court notice, there is no mention of the court notice in O. 45 of the RC 2012. Only the writ of possession and the committal action.

A [59] As such this alleged breach of the writ of possession could be said not to be one that has been established to justify an action for contempt of court under O. 42 r. 6, more so as there has been no application to court under O. 45 r. 6 for a time be specified in the writ of possession for the said act of surrendering the property to be performed (not that it would be proper since it is neither a judgement nor an order). Without such specification, a charge of contempt is defective. Again, the time for compliance is specified in the original judgment of 1 June 2018 to be seven days from that date. Yet this committal action, at the risk of repetition, is not relying on the breach of the original judgment.

C **Conclusion**

[60] In view of the foregoing analysis and reasons, I find that the plaintiff has failed to establish its case of contempt of court against the alleged contemnors. As such the application in encl. 13 is dismissed. I make no order as to costs.

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